

**Letter of Findings: 04-20160661  
Gross Retail and Sales Tax  
For the Years 2010 through 2015**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

**HOLDING**

Despite the fact that Indiana Retailer failed to maintain and provide to the auditor "books and records" as required by Indiana law, the Department sustained Indiana Retailer's protest in part; Indiana Retailer provided information indicating that it ceased business in 2013 and that the original audit assessment should be modified.

**ISSUE**

**I. Sales Tax - Retail Sales.**

**Authority:** IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-2-1(b); IC § 6-2-5-4-1; IC §§ 6-2.5-5 et seq.; IC § 6-2.5-9-3; IC § 6-8.1-5-1(b); IC § 6-8.1-5-1(c); IC § 6-8.1-5-4(a); IC § 6-8.1-5-4(c); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 15-5-1](#).

Taxpayer argues that the Department's audit overstated the amount of sales conducted at its Indiana business location.

**STATEMENT OF FACTS**

Taxpayer is an Indiana business which sells craft items, collectibles, and home décor. Taxpayer began its business in 2004. Taxpayer filed sales tax returns and remitted tax from 2004 through 2010. Taxpayer stopped filing sales tax returns June 2010.

The Indiana Department of Revenue conducted an audit review of Taxpayer's business records and tax returns.

Taxpayer's representative provided bank records. The audit found Taxpayer's records reflected transactions conducted by a separate, unrelated business.

On two occasions during May 2016, the auditor requested copies of sales journals, sales invoices, purchase invoices, and "other records regarding income and expenses . . . ." When the Taxpayer's representative failed to provide the information, the auditor contacted Taxpayer's owner also requesting those materials.

The Department's representative met directly with Taxpayer's owner. The owner explained that Taxpayer "was out of business . . . ." Taxpayer's owner explained that the owner of a building in which Taxpayer was located was responsible for collecting and remitting sales tax.

The Department's representative again requested the information originally requested in May. The request was repeated on two occasions in June.

The Department's audit report indicates that "[n]o records were provided as requested."

The Department proceeded to estimate Taxpayer's 2010 to 2015 sales based on the "Consumer Price Index" adjusted for inflation and the amount of sales last reported by Taxpayer in 2009. The Department's audit resulted in an assessment of additional sales tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. Two administrative hearings were conducted during which Taxpayer's representative explained the basis

for the protest. This Letter of Findings results.

## **I. Sales Tax - Retail Sales.**

### **DISCUSSION**

The issue is whether Taxpayer has established that the Department's audit assessment was incorrect because the audit overstated the amount of its retail sales.

As a threshold issue, it is the Taxpayer's responsibility to establish that the tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, interpretations of Indiana tax law contained within this decision, as well as the preceding audit, are entitled to deference.

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. IC §§ 6-2.5-5 et seq. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-1-2; IC § 6-2.5-4-1.

A retail merchant - such as Taxpayer - is required to "collect the tax as agent for the state." IC § 6-2.5-2-1(b). The retail merchant "holds those taxes in trust for the state and is personally liable for the payment of those taxes . . . ." IC § 6-2.5-9-3.

A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

It should be pointed out that, "Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for tax by reviewing those books and records." IC § 6-8.1-5-4(a). In addition, IC § 6-8.1-5-4(c) provides that, "A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times." In the absence of contemporaneous records, the Department is required by law to issue an assessment based upon whatever alternative means may be available. IC § 6-8.1-5-1(b) provides that "If the [D]epartment reasonably believes that a person has not reported the proper amount of tax due, the [D]epartment shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the [D]epartment." (Emphasis added). See also [45 IAC 15-5-1](#).

Taxpayer explains that it did not report sales tax from 2010 to 2015 because it "moved to a consignment arrangement" and that subsequently its business went into a "wind down mode." To that end, Taxpayer provided a note from the building owner in which Taxpayer was located. That note states the building owner "remits all sales tax to our state sales tax authority." The building owner further states that Taxpayer stopped paying rent and "moved out 08/31/2013." A review of the Department's records indicates that the building owner reported and paid Indiana sales tax but there is nothing which establishes that the building's payments reflected sales tax collected on behalf of Taxpayer or sales tax collected on behalf of its other retail tenants. According to Taxpayer, the building in which it was located included some 100 other retail tenants.

Taxpayer further explains that its bank records establishes its business "trended downward" and that the audit failed to take into account the seasonal nature of its business.

The Department agrees that Taxpayer has provided sufficient information to establish that it ceased business in August 2013. However, Taxpayer's information is not sufficient to adjust the liability for the periods prior to August 2013.

### **DISCUSSION**

Taxpayer's protest is denied in part and sustained in part. The Department's audit division is requested to review

the original assessment and to make whatever adjustments are needed to reflect the determination that Taxpayer ceased business August 2013.

*Posted: 08/30/2017 by Legislative Services Agency*

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